In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-783

FRANK EUGENE SEELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendants, Eugene Peter Linale and Phyllis Linale, were convicted of illicit trafficking in firearms and conspiracy to commit the offense. Petitioner was sentenced to imprisonment for a total of twenty-two years on the various counts of the multi-count indictments on which he was convicted (R. 53).[1] The court of appeals affirmed (Pet. App. A).

[1] There were two multi-count indictments which were consolidated for trial. Petitioner was convicted on all counts of both indictments. Petitioner's co-defendant, Eugene Peter Linale, was likewise convicted on all counts and received the same sentence. Mrs. Linale, who was convicted only of conspiracy received a suspended sentence and three years' probation.

493-253——73

1. Petitioner contends that the affidavit supporting the amended warrant which, when executed, led to the discovery in his home of illicit firearms and equipment for their manufacture, was insufficient. The affidavit[1] recited that the affiant, federal agent Charles E. Hudson, overheard a conversation between petitioner's co-defendant, Peter Linale, and Jefferson Holland, a government agent posing as a trafficker in illicit firearms, in which Holland made arrangements to purchase firearms from Linale. During this conversation, Linale stated that he would have to drive 175 miles to get silencers. The affidavit stated that when Linale delivered the firearms to Holland and Truitt, another government agent, Linale referred to his source as "Frank" and that following his arrest he identified the source as Frank Seeley of North Fort Myers, Florida. It also described the trip of Bannister Barnett, Linale's brother-in-law, to petitioner's residence, where he and Linale took delivery of silencers, and it included Barnett's description of petitioner's workshop. It contained Linale's admission that he had paid for the silencers with an $870 check his wife had written to petitioner, and it recited that bank records corroborated that a check in that amount had been endorsed by petitioner. The affidavit stated that these admissions were further corroborated by an examination of telephone records that showed calls had been made from Linale to petitioner before each of three deliveries to government agents. Finally, it noted that

[1] The affidavit is reproduced on pp. 91–94 of appellant's appendix to his brief in the court of appeals.

firearms records in Washington, D.C. revealed no registration of silencers or other firearms to petitioner.

This affidavit was sufficient to support the issuance of the warrant since it contained adequate information, including the personal observation of the affiant and his fellow officers. In determining whether there was probable cause for the belief that petitioner's residence contained illicit firearms, the issuing magistrate could "judge for himself the persuasiveness of the facts" relied upon by the complaining officer. *Giordenello* v. *United States*, 357 U.S. 480, 486; *Aguilar* v. *Texas*, 378 U.S. 108, 113–114. Moreover, contrary to petitioner's contention, the affidavit was not insufficient because it contained information derived in part from the observations of affiant's fellow agents or other informants. See *United States* v. *Ventresca*, 380 U.S. 102; *Jones* v. *United States*, 362 U.S. 257.

2. Petitioner contends that the reference by the prosecutor in his closing argument to sawed-off rifles, which had unregistered silencers attached and which were mounted in standard attache cases (Gov. Exs. 14, 15), as "assassination kits" (Tr. 1100, 1149) was inflammatory and prejudicial. The prosecutor's characterization of these items which had been seized from petitioner merely confirmed the visual appearance of these exhibits. Moreover, the trial judge instructed the jury to disregard the remarks, and government counsel had earlier advised the jury in the opening comments of his final argument that an attorney's statements were not evidence and that the jurors

should rely on the evidence as they had observed it during the trial.[3] See *Hanley* v. *United States*, 416 F. 2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910.

3. Finally, relying on *Bruton* v. *United States*, 391 U.S. 123, petitioner contends that the court erred in denying his motion for severance since certain statements and admissions of his co-defendants were admitted into evidence. The only statements by Peter Linale which were admitted into evidence were the recorded conversations between him and agent Holland arranging the sale of firearms (Tr. 465-572).[4] Since Peter Linale's statements were made in furtherance of the conspiracy, their admissibility is not precluded by the decision in *Bruton*, which specifically related only to admission of post-conspiracy confessions of a non-testifying co-defendant. Such statements, made in furtherance of a conspiracy by one conspirator, are admissible against other conspirators and do not violate the right to confrontation. *Delaney* v. *United States*, 263 U.S. 586, 590; *United States* v. *Nall*, 437 F. 2d 1177 (C.A. 5); *United States* v. *McGann*, 431 F. 2d 1104 (C.A. 5), certiorari denied *sub nom. Pruitt* v. *United States*, 401 U.S. 919; *People* v. *Brawley*, 461 P. 2d 361 (Sup. Ct., Cal.), certiorari denied *sub nom. Baker* v. *California*, 400 U.S. 993; cf. *Dutton* v. *Evans*, 400 U.S. 74.

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[3] Tr. at p. 281 of the appendix to the government's brief in the court of appeals, which has been filed as the transcript in this Court.

[4] The only references to petitioner in the conversation were Linale's statements that his source was 175 miles away and that his name was "Frank."

The only other statement by a co-defendant was contained in agent Holland's testimony that, after the arrest of Peter Linale, the agent confronted Phyllis Linale with the $870 check made payable to petitioner and asked whether she knew petitioner. Mrs. Linale, he testified, replied affirmatively (Tr. 592). The admission of this statement was not prejudicial since the check made out by Mrs. Linale and endorsed by petitioner was already in evidence (Gov. Ex. 4) and since Bannister Barnett (co-defendant Peter Linale's brother-in-law) had already testified that he had observed Linale give petitioner the check in return for eight silencers. See generally *Schneble* v. *Florida*, 405 U.S. 427; *Harrington* v. *California*, 395 U.S. 250.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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